Supreme Court, U.S.
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No. 09-31

In The
Supreme Court of the United States

FRANCISCO J. REYES,

Petitioner,

v.

BOARD OF COUNTY COMMISSIONERS OF ARAPAHOE COUNTY, COLORADO; DIANE SHOUSE; ARAPAHOE COUNTY SHERIFF GRAYSON ROBINSON; BOARD OF COUNTY COMMISSIONERS OF SEDGWICK COUNTY, KANSAS; SEDGWICK COUNTY SHERIFF GARY STEED; AND SEDGWICK COUNTY UNDER SHERIFF ROBERT HINSHAW,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

G. GORDON ATCHESON
Counsel of Record
THE ATCHESON LAW OFFICE
4800 Rainbow Blvd., Suite 6
Westwood, Kansas 66205
(913) 362-8650

KURT KERNS
ARIAGNO, KERNS, MANK & WHITE
328 N. Main
Wichita, Kansas 67202
(316) 265-5511

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Francisco J. Reyes was stopped for speeding while traveling in Colorado and arrested on a 15-year-old warrant charging a similarly named man with rape in Sedgwick County, Kansas. Despite fingerprint evidence indicating Reyes was not the wanted fugitive, Colorado authorities held him for two weeks and extradited him to Sedgwick County, where he was detained for another two weeks after informing jailers there both orally and in writing he was not the person accused of rape. The district courts granted summary judgment against Reyes in his § 1983 actions for deprivation of liberty. In a consolidated appeal, the Tenth Circuit affirmed based on *Baker v. McCollan*, 443 U.S. 137 (1979), thereby breaking with the First, Ninth, and Eleventh Circuits.

1. Given that Reyes was not the person sought in the warrant, did the lower courts impermissibly degrade his constitutional rights to be free of unreasonable seizure and to be afforded substantive due process by measuring these rights as if he were the accused criminal?

2. Did the lower courts misapply *Baker* to deprive Reyes of appropriate protections against a wrongful deprivation of liberty under the Fourth and Fourteenth Amendments?

PARTIES TO THE PROCEEDING

Petitioner is Francisco J. Reyes. Respondents are: The Board of County Commissioners of Arapahoe County, Colorado, a duly elected legislative body; Diane Shouse, an employee of the Arapahoe County Sheriff's Department; Arapahoe County Sheriff Grayson Robinson, an elected official with charge of the jail; Board of County Commissioners of Sedgwick County, Kansas, a duly elected legislative body; Sedgwick County Sheriff Gary Steed, an elected official with charge of the jail; and Sedgwick County Under sheriff Robert Hinshaw, an appointed official who serves at the pleasure of the sheriff.

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OPINIONS BELOW

The opinion of the U.S. District Court for the District of Colorado granting summary judgment against Francisco Reyes appears at 2008 WL 961565. The opinion of the U.S. District Court for the District of Kansas granting summary judgment against Reyes appears at 2008 WL 2704160. The order of the U.S. Court of Appeals for the Tenth Circuit affirming both summary judgments in a consolidated proceeding is reported at 311 Fed. App. 113 (10th Cir. 2009).

JURISDICTION

The Court of Appeals entered judgment on February 6, 2009. App. 2. On April 28, 2009, Justice Breyer granted Reyes an extension until July 6, 2009 to file his petition for writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides, in pertinent part: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures shall not be violated[.]"

The Fourteenth Amendment to the United States Constitution, Sec. 1, provides, in pertinent part:

"[N]or shall any state deprive any person of life, liberty, or property without due process of law[.]"

STATEMENT

1. On April 1, 1991, a state court judge in Sedgwick County, Kansas signed a warrant for the arrest of a Francisco Reyes on three counts of rape. The warrant included a social security number, a birth date, and several aliases. App. 21 n.1. On November 18, 2005, Petitioner Francisco Reyes was stopped for speeding in Arapahoe County, Colorado. A dispatcher informed the Colorado state trooper making the stop that Reyes's name and birth date, along with several others, were associated with the Sedgwick County warrant. App. 20-21. The trooper arrested Reyes on the warrant and transported him to the Arapahoe County jail. Reyes told the trooper he was not the wanted man. App. 21-22. Reyes, indeed, was not the fugitive named in the warrant nearly 15 years earlier. App. 21 n.1 (The warrant was issued for a different Francisco Reyes).

2. The booking officers at the Arapahoe County jail remarked on the number of different names associated with the arrest warrant. The NCIC printout shows nine names, six birthdates, and three social security numbers associated with the arrest warrant. Reyes's were among those, as were the fugitive Reyes's. App. 22. Reyes is 5'10" tall and weighs 185 pounds. He is from Nicaragua and is a

lawful resident of the United States. The NCIC printout showed the fugitive Reyes to be 5'6" tall with a weight of 145 pounds. He is identified as an illegal alien from Mexico. App. 23. Although they share the same birth day and month, Reyes was born in 1972 and fugitive Reyes was born in 1962.

3. Diane Shouse, a civilian employee of the Arapahoe County Sheriff's department, began processing the paperwork associated with Reyes's arrest. She received a faxed copy of the warrant from the Sedgwick County Sheriff's department. Because she was concerned by the discrepancies in the identifying information between Reyes, who was then in custody, and the fugitive Reyes, Shouse requested additional NCIC printouts. Those reflect the array of names, birthdates, and other identifying information associated with the warrants. She also received individual NCIC printouts for Reyes and one of the aliases used by fugitive Reyes. Those printouts include fingerprint summaries containing differences – indicating Reyes and fugitive Reyes are not the same person. Shouse, however, had never been trained as to what the fingerprint summaries were. She ignored that information and decided not to obtain an actual fingerprint comparison or otherwise attempt to confirm the wanted individual had been jailed on the warrant. App. 23-24 & n.4.

4. On November 22, 2005, Reyes waived extradition in a short hearing in Colorado state court. App. 24-25. Sedgwick County deputies picked up Reyes in Colorado on December 1, 2005 and

transported him to the Sedgwick County jail. During the booking process there, Reyes told the deputy fingerprinting him that he was not the wanted man identified in the warrant. App. 25-26. The next day, Reyes filled out a standard form prisoners use to communicate requests or concerns to the jailers stating that he was not the Francisco Reyes named in the court papers and asking to talk to the law enforcement officers handling the case. Nothing happened. App. 27-28.

5. Reyes, who lives in the Kansas City area, asked his family to hire a lawyer in Wichita for him. On December 15, 2005, the lawyer raised the issue of Reyes's mistaken identity with the district attorney's office. Later that day, after a month in jail in Arapahoe County and Sedgwick County, Reyes was released. App. 31-32.

6. Reyes filed suit in the U.S. District Court for the District of Colorado under 42 U.S.C. § 1983 against various Arapahoe County officials, including Sheriff Grayson Robinson, alleging a violation of his rights under the Fourth and Fourteenth Amendments. App. 8. The District Court granted defendants' motion for summary judgment finding that Reyes suffered no constitutional deprivation in light of *Baker v. McCollan*, 443 U.S. 137 (1979). App. 11-12. Reyes filed a comparable action in the U.S. District Court for the District of Kansas against Sedgwick County officials, including Sheriff Gary Steed. The District Court entered summary judgment against Reyes. App. 58-59. In a consolidated appeal, the U.S.

Court of Appeals for the Tenth Circuit affirmed both lower court rulings noting simply that the "claims are clearly foreclosed by *Baker* [cite omitted]."

REASONS THE PETITION SHOULD BE GRANTED

1. Summary: Circuits Divided on Fundamental Liberty Interest.

This case measures the liberty interests of an individual mistaken for a criminal suspect named in an arrest warrant and then jailed on that warrant. The Court of Appeals for the Tenth Circuit held that *Baker v. McCollan*, 443 U.S. 137 (1979), controls even though it addresses the post-arrest liberty interests of the person actually named in a warrant. As a result, the Tenth Circuit would extend no greater constitutional protections against continued incarceration to a person law enforcement officers snatch off the street simply because they initially and incorrectly identify her as a wanted fugitive than it would accord to that fugitive. Liberty is too precious a right to be curtailed in so rote a manner. And the protections for that fundamental right must be tailored to the circumstances. Accordingly, an agency detaining a person on an arrest warrant has some obligation to determine that it has jailed the wanted individual rather than a person seized by mistake and without any connection to the criminal case.

The Tenth Circuit's ruling fails to take into account material differences between the status of an accused criminal for whom a warrant has been issued and a stranger to that criminal proceeding with the misfortune to have a name similar to the accused. As a result, Reyes and others in the same circumstance receive inadequate constitutional protection against an impermissible and preventable deprivation of liberty.

Liberty is a fundamental right. The improper diminution of that right, especially resulting in detention in a penal facility, reflects precisely the sort of important issue to be addressed on certiorari. *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (freedom from physical detention by one's own government reflects "the most elemental of liberty interests"); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("[F]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."). Indeed, this Court granted certiorari in *Hamdi* to define the liberty interests of a single citizen detained as an enemy combatant.

By relying on *Baker* to define Reyes's right to liberty, the Tenth Circuit has broken with the decisions of other courts of appeals. The Ninth Circuit and the Eleventh Circuit accord greater constitutional protections to persons mistakenly jailed on warrants issued for someone else. *Fairley v. Luman*, 281 F.3d 913, 917-18 (9th Cir. 2002), *cert. denied*, 537 U.S. 1044; *Lee v. City of Los Angeles*, 250 F.3d 668,

683-84 (9th Cir. 2001); *Cannon v. Macon County,* 1 F.3d 1558, 1563 (11th Cir. 1993). The First Circuit has recognized the same constitutional distinction. *Brady v. Dill*, 187 F.3d 104, 115 & n.10 (1st Cir. 1999). Conversely, the Seventh Circuit would side with the Tenth Circuit to indiscriminately apply *Baker* in parceling out constitutional protections to detainees held (rightly or wrongly) on arrest warrants. *Tibbs v. City of Chicago*, 469 F.3d 661, 665 (7th Cir. 2006). This split among the circuits, affecting as it does a fundamental right and growing out of circumstances that have been and will continue to be repeated, also mandates review here.

2. Issue Defined: How Far Does *Baker* Stretch?

The fundamental liberty interest at issue here – to be free of wrongful incarceration – has roots in both the Fourth Amendment and the Fourteenth Amendment. The issue presented, however, does not turn on whether the interest resides in one or the other amendment or both. Under the Fourth Amendment, Reyes has a right to be free of unreasonable seizures, including detention. For constitutional purposes, the reasonableness of a given seizure must be determined from all of the surrounding circumstances and the intrusiveness of the detention. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989) ("What is reasonable, of course, 'depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.'") (quoting *United States v.*

Montoya de Hernandez, 473 U.S. 531, 537 (1985)). The nature of a substantive due process right under the Fourteenth Amendment resting on a fundamental liberty interest is not materially different. A right protected through substantive due process must be "deeply rooted in this Nation's history and tradition" and must be "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed[.]'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Palko v. Connecticut,* 302 U.S. 319, 325, 326, (1937)). In turn, a government entity may restrict or impair a person's liberty only in the service of a compelling interest and even then must act in a narrowly tailored way. *Glucksberg*, 521 U.S. at 721; *Foucha*, 504 U.S. at 83 ("'In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.'") (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)).

The question, then, becomes how to measure the constitutional protection afforded a person detained – deprived of liberty – because a law enforcement agency has mistakenly identified the individual as the subject of an active arrest warrant. The issue is not a rare or abstract one, as the number of cases attest. When thousands of people are booked and detained on arrest warrants, inevitably some of them will not be the wanted fugitives. For example, in 2005, the Sedgwick County jail had an average inmate population of 1,080 and processed over 33,000 persons. *See* Sedgwick County Sheriff's Department

2007 Annual Report at 29, http://quickfacts.census.gov/qfd/states/20/20173.html (accessed September 18, 2008). This case presents the Court with an opportunity to define their constitutional rights in a coherent, uniform way.

But it is also important to define at the outset what falls outside the purview of the question. As the facts suggest, the issue does not entail a mistaken arrest that is promptly undone. Rather, the constitutional deprivation at issue arises not from an arrest but from continued detention following the arrest. Likewise, the issue is not the constitutional protection afforded a person named in a warrant but who professes innocence of the underlying offense charged. The *Baker* decision resolved *that* question. And Reyes does not propose tampering with that outcome.

Rather, the petition asks whether *Baker* ought to be extended to measure the constitutional rights of persons such as Reyes: those who have been detained on warrants seeking the arrest and detention of other persons. The courts of appeals are divided. As a result, persons wrongfully detained on warrants in the Ninth and Eleventh Circuits have greater protections than do similarly situated persons having the bad luck to be jailed in the Seventh or Tenth Circuits. A fundamental liberty interest cannot be irregularly defined by geographic happenstance. However that interest may be measured, the measurement must be the same across the federal jurisdictions.

3. *Baker* Considered and Contained.

In *Baker*, this Court defined the right of an arrestee detained on a warrant properly issued for her to have agents of the detaining entity investigate her claims of innocence on the underlying criminal charge. *Baker*, 443 U.S. at 145-46. The Court recognized that the detaining entity had no constitutional obligation to examine a defense the arrestee might interpose at trial, such as "mistaken identity or . . . lack of requisite intent." *Id.* at 146. The Court went on to state: "Nor is the official charged with maintaining custody of *the accused named in the warrant* required by the Constitution to perform an error-free investigation of such a claim." *Id.* (emphasis added). Evaluating defenses rests in the judicial process and, ultimately, with the fact-finder hearing the criminal case. *Id.*

Not surprisingly, the facts of *Baker* fit that rule. A state court issued an arrest warrant naming Linnie McCollan as the fugitive. In due course, McCollan was taken into custody and asserted his innocence of the criminal charges. (Indeed, his brother Leonard was the actual culprit.) But Linnie McCollan did not contend he was the wrong Linnie McCollan – that the warrant called for the arrest of another person with the same name.

Here, of course, Reyes made precisely that assertion: I am not the person wanted in the arrest warrant; you are not holding the accused criminal, but a name-alike. Those circumstances present a

substantially different constitutional issue from the one in *Baker*, and they call for a different constitutional calculus. That is, *Baker* does not control the outcome either as all-fours precedent or by *a fortiori* reasoning.

There are marked differences. The imposition on the detaining entity cannot be characterized as burdensome. It need not track down witnesses or gather evidence as it would to investigate a detainee's claim of innocence of the underlying crime. Rather, the detaining entity need only compare readily available identifiers of the person physically in custody with those of the person sought in the arrest warrant. Fingerprints work well, as would DNA.

But the deprivation of liberty cuts far more deeply. When a person has been named in an arrest warrant, an independent judicial officer has reviewed sworn statements from law enforcement establishing probable cause to believe that person has committed a crime. *See, e.g.,* K.S.A. 22-2302, K.S.A. 22-2304 (statutes governing issuance of arrest warrants in Kansas). That process prevents a person from being charged or detained without some showing of good cause. And that person's continued detention awaiting a trial to test the whole of the government's evidence does not offend the Constitution. For Reyes and others in his position, however, there are no such safeguards. No law enforcement officer presented any evidence to a judge suggesting Reyes engaged in criminal conduct. Nobody made an independent determination there was probable cause to jail Reyes.

Moreover, his captors had substantial information indicating they held someone other than the wanted criminal.

Applying *Baker*, especially reflexively, also imposes societal costs. First, of course, if law enforcement officers have taken the wrong person into custody on a warrant, they almost certainly have stopped looking for the actual accused criminal. Second, public confidence in the criminal justice process erodes when a person is wrongfully incarcerated. In some ways, holding the wrong person on an arrest warrant is particularly pernicious because of its caprice. Many people share their names with others even in the same community.

4. The Circuits in Conflict.

In deciding this case, the Tenth Circuit simply ignored those considerations and held that *Baker* mandated the outcome. App. 2 (Reyes's constitutional "claims are clearly foreclosed by *Baker*[.]"). The court of appeals made no independent constitutional calculation of the liberty interests at stake as against the imposition on governmental operations. The Seventh Circuit has taken the same mechanical approach in assessing the constitutional protections afforded someone detained on a warrant issued for another person. *Tibbs*, 469 F.3d at 665. The court held "*Baker* forecloses any due process claim based on unreasonable postarrest detention" even though that Ronald Tibbs was jailed for two days on a traffic

warrant issued for another Ronald Tibbs. *Id.* The Seventh Circuit dispatched the issue and Tibbs's constitutional rights in a single paragraph.

Three other circuits, however, recognize fundamental liberty interests demand a more sophisticated analysis and would accord greater constitutional protection to a person jailed on a warrant issued for someone else. Those courts generally acknowledge *Baker* as a starting point – the case, after all, deals with warrants, detainees, and constitutional liberty interests. *See Lee*, 250 F.3d at 684 (noting that *Baker* itself allows for different due process calibrations in different circumstances); *Cannon*, 1 F.3d at 1562-63. But they decline to stretch the decision beyond the facts and law it actually addressed to cover materially different circumstances of the kind ensnarling Reyes. The Eleventh Circuit endorsed "a constitutional right to be free from continued detention after it was or should have been known that the detainee was entitled to release" as a component of Fourteenth Amendment due process and extended that protection to a woman jailed on a warrant issued for the arrest of another woman with a similar name. *Cannon*, 1 F.3d at 1563. Similarly, the Ninth Circuit recognized Fourteenth Amendment protection – and a concomitant civil cause of action – for a man jailed for two weeks on a warrant naming his twin brother. *Fairley*, 281 F.3d at 918. In arriving at that conclusion, the *Fairley* court specifically took account of "the importance of [the man's] liberty interest" and "the minimum burden to the City of instituting readily available

procedures" to verify the correct person had been jailed on the warrant. *Id.* Had Fairley been incarcerated in Chicago or Denver, he would have had no such protection or claim. His constitutional rights would have been cut to fit *Baker* and would have provided him little more than a fig leaf.

The First Circuit took note of the tension between the outcome in *Baker* and the constitutional deprivation exacted from one jailed on a warrant intended for someone else. *Brady*, 187 F.3d at 115 & n.10. As in *Baker*, the *Brady* case grew out of what the circuit court described as "a 'matched' arrest" – one in which "the suspect's identity matches the stated identity of the person denominated in the warrant." *Id.* at 108. Brady claimed that after his arrest law enforcement officers accumulated evidence showing him to be innocent of the underlying offense and had come to believe he, in fact, had been wrongly charged with the crime. And he argued they violated his constitutional rights by failing to short-circuit the criminal prosecution and to secure his release from pretrial detention. In light of *Baker*, which plainly governs that factual scenario, the First Circuit rejected Brady's cause of action. *Id.*

The First Circuit meticulously laid out the rationale of *Baker* and the soundness of that reasoning as applied to factually common cases, such as Brady's, where the person actually named in the warrant has been taken into custody but asserts her innocence of the underlying criminal offense. *Id.* at 109-14. In its analysis, the court of appeals correctly

emphasized both that *Baker* assesses constitutional rights of a detainee following a "matched" arrest, *id.* at 110, and that Brady conceded he was the person named in the warrant on which he had been detained, *id.* at 108. The court of appeals also took pains to point out that *Baker* ought not be extended beyond its factual foundation in a "matched" arrest. The court stated: "We emphasize that we are dealing here with a situation in which the troopers arrested and took into custody the individual who was named in a facially valid warrant." *Id.* at 115 n.10. And it hastened to add, "If the police were to mis-execute a warrant, i.e., if they were to arrest someone other than the person named in the warrant because of mistaken identities, a different case would arise." *Id.* at 115 n.10.

CONCLUSION

The divide among the circuit courts is real, and that division causes liberty interests to be disparately allocated and protected. But a fundamental right should not be parceled out by the yard in some places and by the inch in others. It should be dispensed the same everywhere. The petition should be granted to allow this Court to provide that uniformity.

Respectfully submitted,

G. GORDON ATCHESON
KURT KERNS

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FRANCISCO J. REYES, Plaintiff-Appellant, v. BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF ARAPAHOE, COLORADO; DIANE SHOUSE; ARAPAHOE COUNTY SHERIFF GRAYSON ROBINSON; JOHN DOE; JAMES ROE, Defendants-Appellees.	No. 08-1141 (D. Ct. No. 1:06-CV-02319-WDM-BNB) (D. Colo.)
FRANCISCO J. REYES, Plaintiff-Appellant, v. BOARD OF COUNTY COMMISSIONERS OF SEDGWICK COUNTY, KANSAS; GARY STEED, SEDGWICK COUNTY SHERIFF; ROBERT HINSHAW, SEDGWICK COUNTY UNDERSHERIFF, Defendants-Appellees, JOHN DOE; JAMES ROE; SAM SMITH, Defendants	No. 08-3181 (D. Ct. No. 2:07-CV-02193-KHV) (D. Kan.)

ORDER AND JUDGMENT*

(Filed Feb. 6, 2009)

Before **TACHA, SEYMOUR**, and **HOLMES**, Circuit Judges.

Plaintiff-Appellant Francisco J. Reyes was arrested in Arapahoe County, Colorado on a facially valid warrant issued in Sedgwick County, Kansas. Following his detention in Arapahoe County, he was extradited to and detained in Sedgwick County. After his release, he filed a complaint under 42 U.S.C. § 1983 in the United States District Court for the District of Colorado and the District of Kansas, alleging violations under the Fourth and Fourteenth Amendments. Each district court granted summary judgment to the Defendants-Appellees, and Mr. Reyes appealed each decision. Because the district courts' rulings and the issues raised on appeal are identical for both appeals, we consider them together.

Mr. Reyes's claims are clearly foreclosed by *Baker v. McCollan*, 443 U.S. 137 (1979). Accordingly, and for substantially the same reasons articulated by the district courts, we AFFIRM the district courts' grant

* This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

of summary judgment to the Defendants-Appellees. The motion to seal the appendices is granted.

ENTERED FOR THE COURT,

Deanell Reece Tacha
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE WALKER D. MILLER

Civil Action No. 06-cv-02319-WDM-BNB

FRANCISCO J. REYES,

Plaintiff,

v.

BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF ARAPAHOE, et al.,

Defendants.

ORDER ON MOTION FOR SUMMARY JUDGMENT

(Filed Apr. 8, 2008)

MILLER, J.

This matter is before me on the Motion for Summary Judgment (doc no 107) filed by the Board of County Commissioners of the County of Arapahoe ("Board"), the Arapahoe County Sheriff Grayson Robinson, and Diane Shouse. Plaintiff opposes the motion. After a review of the parties' written arguments, I conclude oral argument is not required. For the reasons that follow, the motion will be granted.

Background

On or around November 18, 2005, Plaintiff was stopped by Phillip Gallegos, a Colorado State Trooper,

for speeding though a construction zone.[1] Plaintiff provided a Kansas identification card that identified him as "Francisco J. Reyes" with a date of birth of October 10, 1972. Plaintiff's full name is Francisco Jose Reyes. Gallegos then contacted the Colorado State Patrol Dispatch Center via radio and provided Plaintiff's name, birth date, and identification number to check for outstanding warrants. Gallegos was informed by the dispatcher that there was an outstanding warrant on the charge of rape from Wichita (Sedgwick County) Kansas for a Francisco J. Reyes with the same Kansas identification card number. The fugitive used a variety of names, including Francisco R. Carrillo, Poncho Reyes, Francisco Javier Reyes, Javier Reyes, Francisco Javier Miranda Reyes, and Javier Francisco Reyes Aguilar. In addition, Gallegos was informed that the wanted suspect used several birth dates, including October 10, 1972. Finally, Gallegos was told that the wanted suspect had a scar on his right arm. Gallegos examined Plaintiff's right arm and found a scar there. Gallegos then arrested Plaintiff based on the outstanding warrant and transported him to the Arapahoe County Detention Facility (the "ACDF").

Plaintiff expressed surprise to Gallegos over the rape allegations and told him that it must be a mistake. Plaintiff also may have told the booking deputy at

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[1] There is apparently no dispute that Gallegos had probable cause or reasonable suspicion to make the initial traffic stop.

ACDF that there had been a mistake and that he would be "leaving pretty soon." This was apparently the only time that Plaintiff attempted to inform anyone at ACDF that he was not the Francisco J. Reyes identified in the warrant.

The ACDF received a teletype reference to the Kansas felony warrant of the suspect, which the receiving deputy at the ACDF compared to Plaintiff's information, obtained from Plaintiff's identification card and from Plaintiff. The receiving deputy confirmed that the wanted Kansas subject had the same first name, family name, and middle initial as Plaintiff. In addition, the Kansas identification card number for the wanted subject was the same as Plaintiff's. There were a variety of aliases, alias birth dates and social security numbers associated with the wanted subject, including a birth date and social security number matching Plaintiff's. It is undisputed, however, that the fugitive's known aliases did not include the names "Francisco Jose" or "Jose" in any combination.

Diane Shouse, a senior clerk who works for the Arapahoe County Sheriff's Office Fugitive Transport Section, also compared Plaintiff's booking report information with a [sic] information from the fugitive from justice warrant information she had. She contacted the Sedgwick County Sheriff's Office and ordered a copy of the warrant. Ms. Shouse noted the same similarities between Plaintiff's information and that of the wanted suspect. She did, however, observe some differences in the physical descriptions and other information, which caused her to notify her

supervisor of the discrepancies. Plaintiff's identification and the booking report showed that he was 5'10" and weighed 180-185 pounds. The wanted fugitive, on the other hand, was listed as being 5'6" and weighing 145 pounds.[2] Nonetheless, after discussion, Ms. Shouse and her supervisor decided they were satisfied that Plaintiff was the person described in the warrant and took no further action. It is undisputed that Ms. Shouse and others at the ACDF had the ability to easily request a fingerprint comparison between Plaintiff and the wanted fugitive but did not do so. There is evidence that the officers were aware that information in the teletype was not always accurate.

On November 22, 2005, the Tuesday following Plaintiff's Friday arrest, Plaintiff appeared at a fugitive advisement proceeding. Plaintiff was assigned a public defender to represent him at the hearing. Plaintiff advised his attorney that he wished to waive extradition and did not inform his attorney, the district attorney, or the court that he was not the person named in the warrant. In his deposition, Plaintiff testified that he thought it would be easier to clear up the misunderstanding in Kansas and so decided the fastest resolution would be to return to

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[2] Plaintiff also argues that Ms. Shouse obtained other database information about Plaintiff containing a description of his fingerprint patterns, which also differed from the wanted suspect's. Whether Ms. Shouse had access to the fingerprint data is disputed but immaterial, as Ms. Shouse testified in her deposition that she did not know how to interpret the fingerprint pattern data.

Kansas, rather than disputing the warrant in Colorado. Plaintiff signed a waiver of extradition form and advisement of rights; the court then accepted the waiver of extradition and informed Plaintiff that an extradition review would be set for December 2, 2005. A copy of the waiver of extradition was provided to Shouse, who then notified the Sedgwick County Sheriff's Office in Wichita that Plaintiff had waived extradition and could be transported.

While incarcerated at the ACDF, Plaintiff sent at least three written Inmate Request Forms. In the first, he requested a phone call to his family, in the second, which occurred after his hearing, he complained of heartburn and requested shoes, and in the third, he requested to see a dentist. Plaintiff at no time sent a written request form about the mistaken identification. Plaintiff was extradited to Sedgwick County, Kansas on or about December 1, 2005 and was thereafter released.

Plaintiff initiated this lawsuit pursuant to 42 U.S.C. § 1983. In his Amended Complaint, he asserts one claim against the Arapahoe County defendants, including Shouse and other unnamed officers in their individual capacities, the Sheriff of Arapahoe County in his official capacity, and the County itself through its Board of County Commissioners, contending that the detention violated his Fourth Amendment and Fourteenth Amendment rights.

Standard of Review

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. A factual issue is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby,* 477 U.S. 242, 248 (1986).

Where "the moving party does not bear the ultimate burden of persuasion at trial, it may satisfy its burden at the summary judgment stage by identifying 'a lack of evidence for the nonmovant on an essential element of the nonmovant's claim.'" *Bausman v. Interstate Brands Corp.,* 252 F.3d 1111, 1115 (10th Cir. 2001) (quoting *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998)). Then, "[t]o avoid summary judgment, the nonmovant must establish, at a minimum, an inference of the presence of each element essential to the case." *Id.*

Discussion

Defendants move for summary judgment on the grounds that Plaintiff's detention did not deprive Plaintiff of a constitutional right, that Shouse did not personally participate in any action giving rise to liability and/or that she has absolute or qualified immunity, that the Board is not a proper party, and that no custom or policy of the Board or the Sheriff caused any constitutional violation. I agree with Defendants that Plaintiff cannot, as a matter of law,

prove that his detention violated the Fourth or Fourteenth Amendments.

"In an action under section 1983, individual defendants are entitled to qualified immunity unless it is demonstrated that their alleged conduct violated clearly established constitutional rights of which a reasonable person in their positions would have known." *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1251 (10th Cir. 1999). Once a defendant has raised qualified immunity as an affirmative defense, the plaintiff bears the heavy two-part burden of demonstrating that (1) the defendant violated a constitutional right and (2) the constitutional right was clearly established at the time of the alleged conduct. *Reynolds v. Powell,* 370 F.3d 1028, 1030 (10th Cir. 2004).

The facts here are relatively straightforward. Plaintiff's information matched numerous descriptors and identifiers corresponding to the wanted fugitive, including his first and last name (and middle initial), his Kansas identification card number, and a birth date and social security number used by the suspect, as well as eye color, hair color, race/ethnicity, and identifying scar. In addition, there is no dispute that Shouse and other deputies or employees had some notice that Plaintiff might not be the fugitive and could have easily verified that he was not. The key fact, however, is that Plaintiff, except possibly at his initial booking, did not protest the identification or his detention. Most importantly, at his first court appearance, he informed no one that he was not the

suspect identified in the warrant but rather decided to wait until he was returned to Kansas to resolve the problem. Under the governing case law, I must conclude that the Defendants' actions were no more than negligent, which does not give rise to a constitutional violation.

Plaintiff, unfortunately, is not the first to have been mistaken for a wanted fugitive named in a valid arrest warrant. The United States Supreme Court addressed mistaken identification issues in *Baker v. McCollan,* 443 U.S. 137 (1979). In *Baker,* the respondent's brother had appropriated his identification. When the brother was arrested on narcotics charges, he presented the respondent's driver's license with the brother's picture in it. An arrest warrant was thereafter issued in the respondent's name and he was arrested after a traffic stop. The Supreme Court held that the respondent's arrest was constitutionally sufficient because it was pursuant to a facially valid warrant, which satisfied the Fourth Amendment. In addition, the Court refused to find a constitutional violation in the sheriff's failure to investigate the respondent's claim of mistaken identification. This insulation from liability was not unlimited, however. "Obviously, one in respondent's position could not be detained indefinitely in the face of repeated protests of innocence even though the warrant under which he was arrested and detained met the standards of the Fourth Amendment." 443 U.S. at 144. The Court also concluded that, depending on the procedures afforded by a state, a due process violation could result from

detention "in the face of repeated protests of innocence" and after "the lapse of a certain amount of time." *Id.* at 145. Noting that the Constitution "does not guarantee that only the guilty will be arrested," the Court refused to find the respondent's eight-day detention to be a violation of constitutional dimensions, as it is the role of the judiciary to provide due process in this regard. *Id.* "[W]e do not think a sheriff executing an arrest warrant is required by the Constitution to investigate independently every claim of innocence, whether the claim is based on mistaken identity [or other defense]. . . . Nor is the official charged with maintaining custody of the accused named in the warrant required by the Constitution to perform an error-free investigation of such a claim." *Id.* at 145-46.

Baker, therefore, did not place an affirmative duty upon police officers to investigate claims of mistaken identity and, moreover, made clear that due process concerns are evaluated by reference the available judicial proceedings. In addition, Baker set forth two implied conditions for an unconstitutional detention: repeated protests of mistaken identity and an extended lapse of time.

Baker has therefore provided the framework for mistaken identity cases, including those such as Plaintiff's, where the person arrested has a name similar to that of a suspect in an arrest warrant. *See, e.g., Young v. City of Little Rock,* 249 F.3d 730 (8th Cir. 2001) (plaintiff was detained on warrant because her named [sic] matched alias used by her fugitive sister;

although photographs of plaintiff and fugitive did not match, officer's decision to wait until court hearing and allow judge to make final determination was reasonable under the circumstances, following *Baker*); *see also Hill v. Scott,* 349 F.3d 1068 (8th Cir. 2003) (plaintiff Brian Arthur Hill, who was arrested on warrant issued for Brian Walter Hill, had no constitutional claim against arresting officer, as officer knew that first and last names were the same, that the two Brian Hills were two years apart in age and only one inch different in height, and officer did not have information about fugitive's race; although further investigation might have shown error, under the circumstances, officer had sufficient consistent identifying information to reasonably conclude that warrant was for plaintiff); *Archuleta v. Wagner,* Case No. 06-cv-02061-LTB-MJW, 2007 WL 646317 (D. Colo., Feb. 27, 2007) (plaintiff's name was same as alias used by wanted fugitive; booking plaintiff after arrest on warrant, despite claims of innocence and mistaken identity, did not give rise to constitutional claim against booking officer, despite officer's subjective belief that plaintiff might not be person named in warrant).

Here, it was reasonable for the ACDF employees to conclude that Plaintiff was the person named in the warrant, as there were numerous matching identifiers, including a scar on the right arm. Accordingly, I cannot conclude that Plaintiff's Fourth Amendment rights were violated, as the facially valid warrant gave the officers sufficient probable cause to arrest

and detain Plaintiff. While further investigation, such as a fingerprint comparison, might have revealed the error, the employees were under no affirmative duty to conduct such an investigation, particularly in light of Plaintiff's apparent acquiescence. Plaintiff's Fourteenth Amendment due process claim also fails, as he was given a prompt hearing but decided not to contest his detention or extradition, or even to notify his attorney, the district attorney, or the court, of the mistake. Moreover, Plaintiff's detention, again considering that he did not make any effort after his initial booking to clear up the error, was not unduly long (November 18 to December 1). To prevail on a substantive due process claim, a plaintiff must demonstrate that the defendants engaged in behavior that shocks the conscience. *Moore v. Guthrie,* 438 F.3d 1036, 1040 (10th Cir. 2006) ("The ultimate standard for determining whether there has been a substantive due process violation is whether the challenged government action shocks the conscience of federal judges.") (internal punctuation and citation omitted). As discussed further below, Defendants here at most negligently failed to discover that Plaintiff was not the fugitive named in the warrant, which does not, in these circumstances, rise to the level of "conscience shocking" conduct.

Plaintiff has cited several cases in which the courts concluded that the detaining or arresting officers acted unconstitutionally in refusing to investigate or release a person wrongfully arrested on a valid warrant. However, these cases all are factually

distinguishable from Plaintiff's and, therefore, do not help Plaintiff's claim to survive. *See Fairley v. Luman,* 281 F.3d 913 (9th Cir. 2002) (man held on warrants issued for his twin brother repeatedly protested his 12-day detention; arrestee and arresting officers told booking sergeant that plaintiff had a twin and prison officials responded to plaintiff's protests by reducing his privileges); *Lee v. City of Los Angeles,* 250 F.3d 668 (9th Cir. 2001) (two-year detention of "obviously" mentally disabled man who shared no physical characteristics with fugitive); *Cannon v. Macon County,* 1 F.3d 1558 (11th Cir. 1993) (three-month detention of person with significant differences in physical appearance, different social security number and date of birth, and who repeatedly protested the detention; booking officer admitted he filled out arrest report with information from NCIC fugitive report rather than from the plaintiff); *Atkins v. City of Chicago,* 441 F. Supp. 2d 921 (N.D. Ill. 2006) (37-day incarceration of plaintiff who repeatedly protested detention and whose information differed from wanted suspect in almost all respects except name); *see also Russo v. City of Bridgeport,* 479 F.3d 196 (2d Cir. 2007) (officer violated plaintiff's Fourth Amendment rights by withholding and concealing exculpatory evidence demonstrating that plaintiff, arrested pursuant to valid warrant, was not the person who committed the crime). These cases in general involve repeated protestations by the arrestee, significant differences between the wanted fugitive's and the arrestee's identifying information, extended detentions and/or other

extraordinary circumstances not present here (e.g., mental disability, knowing concealment).

In contrast, the circumstance here present at most negligence, in that the officers could have discovered that Plaintiff was not the wanted fugitive if they had taken further investigative steps. All the cited cases, taken together, show that a wilful refusal to verify a repeated claim of mistaken identity over an extended period of time could support a claim, but none stand for the proposition that the mere failure to discover the error is a constitutional violation in circumstances where the arrestee matches the fugitive in many respects and has the ability and opportunity, including a court hearing, to bring the mistake to light but does not. Plaintiff thus fails to overcome the first prong of the qualified immunity defense, proving a violation of a constitutional right, much less the second prong, showing that the right was clearly established under governing United States Supreme Court or Tenth Circuit case law.

Because the detention did not violate Plaintiff's constitutional rights, I need not consider Defendants' remaining arguments.

Accordingly, it is ordered:

1. Defendants' Motion for Summary Judgment (doc no 107) is granted. Defendants are entitled to judgment as a matter of law and all asserted claims are dismissed with prejudice.

2. Defendants may have their costs.

DATED at Denver, Colorado, on April 8, 2008.

BY THE COURT:

s/ Walker D. Miller
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

FRANCISO [sic] **J. REYES,** **Plaintiff,** **v.** **BOARD OF COUNTY COMMISSIONERS OF SEDGWICK COUNTY, KANSAS; GARY STEED, SEDGWICK COUNTY SHERIFF; AND ROBERT HINSHAW, SEDGWICK COUNTY UNDERSHERIFF,** **Defendants.**	**Case No. 07-CV-2193-KHV**

MEMORANDUM AND ORDER

(Filed Jul. 3, 2008)

Francisco Jose Reyes brings suit against the Board of County Commissioners of Sedgwick County Kansas ("the Board"), Sheriff Gary Steed and Undersheriff Robert Hinshaw under 42 U.S.C. § 1983 and Kansas common law. Specifically, plaintiff alleges violations of the Fourth and Fourteenth Amendments, false imprisonment and negligence. This matter comes before the Court on *Defendants' Motion For Summary Judgment* (Doc. #33) filed March 13, 2008. For reasons stated below, the Court finds that defendants' motion should be sustained in part.

Summary Judgment Standards

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Vitkus v. Beatrice Co.*, 11 F.3d 1535, 1538-39 (10th Cir. 1993). A factual dispute is "material" only if it "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. A "genuine" factual dispute requires more than a mere scintilla of evidence. *Id.* at 252.

The moving party bears the initial burden of showing the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Hicks v. City of Watonga*, 942 F.2d 737, 743 (10th Cir. 1991). Once the moving party meets this burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial "as to those dispositive matters for which it carries the burden of proof." *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). The nonmoving party may not rest on his pleadings but must set forth specific facts. *Applied Genetics*, 912 F.2d at 1241.

The Court must view the record in a light most favorable to the parties opposing the motion for summary judgment. *Deepwater Invs., Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1110 (10th Cir. 1991). Summary judgment may be granted if the nonmoving party's evidence is merely colorable or is not significantly probative. *Anderson*, 477 U.S. at 250-51. "In a response to a motion for summary judgment, a party cannot rely on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial." *Conaway v. Smith*, 853 F.2d 789, 794 (10th Cir. 1988). Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52.

Factual Background

The following material facts are uncontroverted, deemed admitted or, where disputed, viewed in the light most favorable to plaintiff.

On November 18, 2005, Phillip Gallegos, a Colorado State Trooper, stopped plaintiff Francisco Jose Reyes for speeding in a construction zone in Arapahoe County, Colorado. Plaintiff did not have a valid driver's license, but he produced a Kansas identification card (No. K00951769) which identified him as Francisco J. Reyes with a birth date of [Date Of Birth Omitted]. *See* Gallegos Depo. at 14-15, attached as

Ex. A to *Defendants' Memorandum In Support Of Motion For Summary Judgment* ("*Defendants' Memorandum*") (Doc. #34). Gallegos contacted the Colorado State Patrol Dispatch Center to check for outstanding warrants on Francisco J. Reyes with that birth date and Kansas identification number K00951769. The dispatcher informed Gallegos that Sedgwick County, Kansas had an outstanding rape warrant for a Francisco J. Reyes with the same Kansas identification card number.[1] The dispatcher told Gallegos that "a number of different names" were associated with the warrant. *See id.* ¶ 7. The dispatcher also told Gallegos that plaintiff's birth date matched one of several birth dates which the fugitive used. Gallegos determined that plaintiff had a scar on his right arm, which was one of the identifying descriptors for the fugitive. Plaintiff told Gallegos that he was not the person sought in the warrant, but Gallegos arrested him and transported him to the Arapahoe County jail.[2]

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[1] On April 1, 1991, Sedgwick County District Court Judge Paul Clark had signed a warrant charging a different Francisco Reyes – Francisco Javier Reyes – with three counts of rape. The warrant provided three aliases: "Poncho Reyes," "Francisco Reyes Carillo" and "Francisco * Reyes." The warrant listed a social security number ending in [Social Security Number Omitted] and a birth date of [Date Of Birth Omitted] (the same date but different year from plaintiff's). *See* Warrant, attached as Ex. I to *Defendants' Memorandum*.

[2] The record contains no evidence that Gallegos communicated plaintiff's claim of mistaken identity to anyone in Arapahoe County, Colorado or Sedgwick County, Kansas. Because the

(Continued on following page)

The Arapahoe County jail received a printout from the Federal Bureau of Investigation National Crime Information Center ("NCIC") on the Sedgwick County warrant. It showed nine aliases attributed to the warrant.[3] *See* NCIC teletype, attached as Ex. 34-9 to *Defendants' Memorandum.* At the jail, the booking officers asked plaintiff what name he went by and discussed among themselves the large number of aliases or alternate names attributed to the Sedgwick County warrant. The receiving deputy confirmed that plaintiff had the same first name, middle initial and surname as set out in the warrant; that plaintiff's birth date was one of six alias birth dates which the fugitive used; and that plaintiff's Kansas identification card number and social security number matched numbers linked to the fugitive. *See* Nesvold Affidavit ¶¶ 7-14; attached as Ex. D to *Defendants' Memorandum,* Booking Report, attached as Ex. G to *Defendants' Memorandum;* NCIC Warrant Teletype dated November 18, 2005, attached as Ex. E to *Defendants' Memorandum.*

The Arapahoe County booking report listed plaintiff's name as Francisco Jose Reyes. No name or alias

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record reveals no information that defendants in this case received this information, it has no bearing on their liability, and the Court disregards it.

[3] The NCIC is the FBI's national computerized data bank, designed to assist federal, state and local law enforcement agencies. The NCIC system contains inaccurate information on some suspects.

in the NCIC printout included the middle name Jose, but several of them included the name Javier. The booking report listed plaintiff's height and weight as 5'10" and 185 pounds, while the NCIC printout showed the fugitive's height and weight as 5'6" and 145 pounds. The printout listed Nicaragua as plaintiff's birthplace and Mexico as the fugitive's birthplace. The booking report listed plaintiff's social security number as [Social Security Number Omitted], one of three social security numbers which the NCIC attributed to the warrant.

On November 21, 2005, a Sedgwick County sheriff's deputy faxed the warrant to Diane Shouse, the Arapahoe County fugitive warrants clerk. That same day, Shouse obtained NCIC printouts for Francisco J. Reyes and Francisco R. Carillo, an alias on the Sedgwick County warrant. The warrant contained only the birth date of [Date Of Birth Omitted] and the social security number of [Social Security Number Omitted] – neither of which belonged to plaintiff. *See* Warrant, attached as Ex. I to *Defendants' Memorandum*. The NCIC printout for plaintiff correctly listed a birth date of [Date Of Birth Omitted], a height of 5'9", a weight of 190 pounds and the birthplace of Nicaragua.

The NCIC printout for Francisco R. Carillo (one of the aliases on the warrant) listed a birth date of [Date Of Birth Omitted] (an "alternative" birth date on the warrant); a height of 5'6"; a weight of 145 pounds; Mexico as the place of birth; and a social security number of [Social Security Number Omitted]

(the same social security number as the Sedgwick County rape warrant).[4] Shouse compared plaintiff's information with that provided for the fugitive. The booking report identified plaintiff's middle name as Jose, and the warrant listed the fugitive's middle name as Javier. The booking report also listed plaintiff's birth date as [Date Of Birth Omitted], while the warrant provided the fugitive's birth date as [Date Of Birth Omitted]. Because of these discrepancies, Shouse spoke to her supervisor. She nonetheless was satisfied that plaintiff was the fugitive identified in the warrant, so she completed the case and sent it to the District Attorney.

On November 22, 2005, plaintiff appeared in Arapahoe County District Court with his public defender, Chris Baumann. Baumann gave the court a written Advisement of Rights in which plaintiff acknowledged that he understood his rights, including the right to challenge the legality of the arrest and contest extradition. *See* Affidavit of Stephen

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[4] The NCIC printout which Shouse obtained for "Francisco Reyes" showed fingerprint pattern data of WU WU WU WU WU WU WU WU WU WU. *See* Dominguez Depo. at 22-23. The NCIC printout for Carillo showed fingerprint data of WU, RS, RS, WU, WU, WU, WU, WU, WU, LS. *Id.* If the fingerprint pattern data was correct, Francisco Reyes and Francisco Carillo were not the same person. Shouse did not understand the fingerprint data on the NCIC printout and did not use that information for any purpose. Based on discrepancies in personal information, Shouse decides whether to ask for a fingerprint comparison. If Shouse had known that the fingerprints of plaintiff and Carillo were different, she would have requested a fingerprint comparison.

Fauver ¶ 9, attached as Ex. J to *Defendants' Memorandum;* Advisement of Rights, attached as Ex. K to *Defendants' Memorandum.* Baumann told the court that plaintiff was voluntarily waiving extradition and gave the court an executed waiver of extradition. *See* Transcript of Hearing, attached as Ex. N to *Plaintiff's Memorandum;* Waiver of Extradition, attached as Ex. L to *Plaintiff's Memorandum.* Plaintiff and Baumann did not claim that plaintiff was not the person named in the warrant. In fact, plaintiff never told his attorney that he was not the person named in the warrant; he simply said that he wanted to waive extradition to Kansas.[5]

On November 22, 2005, Arapahoe County notified the Sedgwick County Sheriff's Department that plaintiff had waived extradition. Sedgwick County did not send mug shots or fingerprints to Arapahoe County because Arapahoe County did not request them and the Sheriff's Department interpreted plaintiff's waiver of extradition as a concession that plaintiff was the person named in the warrant. *See* Hinshaw Depo. at 54, 117-19, attached as Ex. O to *Defendants' Memorandum.*

On December 1, 2005, two Sedgwick County deputies transported plaintiff to Sedgwick County on

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[5] When asked why he did not tell Baumann that he was the "wrong guy," plaintiff responded that "[i]t was very fast . . . He just barely spoke to me and left." *See* Reyes Depo. at 116, 182-83, attached as Ex. C to *Defendants' Memorandum.*

a county-owned airplane. During the flight, plaintiff did not complain of mistaken identity. The deputies took plaintiff to the Sedgwick County jail, where they booked him. Plaintiff testified about the booking process as follows:

> Q. As to any of the folks that you talked to them, . . . did you tell them that "you got the wrong guy; I'm not the correct Francisco Reyes?"
>
> A. Yes. . . . The finger – The ones that did my fingerprints, I told them I am not this guy.
>
> Q. What did they say?
>
> A. They said, "Well, the faster we get this done, the faster you go to population." . . . I wanted to go get a bed because I was sleeping on the floor at the holding tank. . . . So I went ahead and signed it just to get a cell.

See Reyes Depo. at 226-27, attached as Ex. C to *Defendant's Memorandum*. The booking officers asked plaintiff to sign a card which said (among other things) that he was from Mexico. Plaintiff said that he did not want to sign it because he was from Nicaragua. The officer said, "Well, sign it now, it's faster, and you can deal with it later." *See id.* at 227. The officer asked if Nicaragua was a city in Mexico, so at that point, plaintiff stopped talking to him. *See id.* at 228. Except for this exchange, plaintiff did not claim

mistaken identity to any officer involved in his processing.

At approximately 1:40 p.m. on December 2, 2005, plaintiff made his first appearance in Sedgwick County District Court. At that hearing, plaintiff did not protest his innocence or allege mistaken identity to either the court or the District Attorney.

After his first appearance on December 2, 2005, plaintiff prepared an inmate request form commonly called a KITE. On the form next to his name, plaintiff wrote "DOB [Date Of Birth Omitted]" and his social security number. The request stated "I would like to talk to the Detective about my case because this Francisco Javier Reyes is not me." Under "Franciso Javier Reyes," plaintiff wrote "[Date Of Birth Omitted]" (the birth date of the fugitive) and the social security number listed on the warrant. Plaintiff's Depo. at 243, attached as Ex. C to *Defendants' Memorandum;* Inmate Request Form 12/2/05, attached as Ex. R to *Defendants' Memorandum.*

The inmate request form is a carbonless three-copy form for inmates to address concerns to staff, courts, detectives or the commissary. Under Sedgwick County jail procedures, an inmate fills out the form and gives it to the pod deputy. The pod deputy initials the form, dates it, gives one copy back to the inmate and sends the other two copies to the inmate coordinator, who decides how to proceed. If the deputy can handle the inmate's concern or issue, he or she may do so even if the KITE is addressed to a ranking

officer. *See* Hairston Depo. at 15-24, attached as Ex. U to *Defendants' Memorandum.* The official who receives the form writes a response, keeps a copy and sends the remaining copy back to the inmate. *See* Hinshaw Depo. at 40-41; 46-48, attached as Ex. O to *Defendants' Memorandum.* The instructions on the form direct the inmate to follow up with the watch supervisor if he does not receive a satisfactory response.

On December 2, 2005, plaintiff gave his inmate request form to Deputy Lanetta Hairston. She placed her identification number and date on the request. Hairston does not recall plaintiff or specifically remember taking his request form, but she is certain that she placed the request in the inmate coordinator's bin and she presumes that the inmate coordinator properly processed the request. Hairston Depo. at 2, 15-24, attached as Ex. U to *Defendants' Memorandum,*

The rape warrant did not identify the law enforcement agency which initiated or investigated the case. Neither the Sheriff's Department or the Wichita Police Department contacted plaintiff in response to his inmate request, however, and plaintiff did not follow up with the watch supervisor when he did not get a response. *See* plaintiff's Depo., attached as Ex. C to *Defendants' Memorandum,* at 246.

According to Undersheriff Hinshaw, jail personnel should obtain a fingerprint comparison if there is a question about an inmate's identity.[6] Mug shots and fingerprints are generally available, but the fugitive fingerprints in this case were not immediately accessible because they were in the file of the city detective who originally handled the rape case. Also, because the mug shot for the fugitive was not digital, the Sheriff's Department could not view it on the computer system when it processed plaintiff. *See Investigation Report Of Major Hinshaw* at 5, attached as Ex. P to *Defendants' Memorandum.*[7]

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[6] Sheriff Steed does not believe that his facility necessarily should have obtained a fingerprint comparison in this case, but he believes that it would have been helpful if Colorado authorities had compared fingerprints. The Sheriff's Department did not have an employee who was qualified to interpret fingerprints, but it routinely scanned fingerprints and e-mailed them to the Kansas Bureau of Investigation for comparison. Also, the Police Department for the City of Wichita had certified fingerprint examiners, and it is located less than one block from the Sedgwick County jail.

[7] Plaintiff objects to the Investigation Report Of Major Hinshaw as hearsay, as follows:

> The investigation report of Major Hinshaw is inadmissible hearsay if offered by the Defendants in this case. It fits no hearsay exception. The report is an after-the-fact review of Reyes's incarceration and, as such, does not reflect a regularly conducted business activity of the type contemplated in F.R.E. 803(6). Likewise, it is not a report compiled pursuant to "authority granted by law" so as to be admissible under F.R.E. 803(8) in that the Sedgwick County Sheriff's Department has no statutory duty to conduct internal evaluations of

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At his deposition, Sheriff Steed was initially unsure whether his department had a specific policy on how to determine if a person booked on a warrant is, in fact, the right person. Steed Depo. at 15, attached as Ex. Y to *Defendants' Reply* (Doc. # 49) filed May 22, 2008. He testified that the department

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> that type. *See Marsee v. U.S. Tobacco Co.*, 866 F.2d 319, 325 (10th Cir. 1989). Also, there are insufficient indicators of trustworthiness in an ad hoc, self-investigation in the face of potential legal liability to permit admission of the report either under an exception in F.R.E. 803 or in the face of F.R.E. 403 (tendency to mislead jury would outweigh any relevance).

Plaintiff's Response, Doc. #48 at 7, 9. Plaintiff's objection is without merit.

Fed. R. Evid. 803(6) excepts business records from the hearsay exclusion. Defendants have offered uncontroverted evidence that the Sheriff's Department regularly conducts internal investigations and prepares reports. *See Haskell v. U.S. Dept. of Agric.*, 930 F.2d 816, 819 (10th Cir. 1991) (reports prepared in normal course of law enforcement investigations admissible under 803(6)). Further, Fed. R. Evid. 803(8) exempts reports of public offices from the hearsay exclusion. The Sheriff has authority to investigate allegations and internal matters. K.S.A. § 19-811. *See Perrin v. Anderson*, 784 F.2d 1040, 1047 (10th Cir. 1986) (report of department's shooting review board admissible pursuant to Rule 803(8)); *Wilson v. Beebe*, 743 F.2d 342, 346-47 (6th Cir. 1984) (admitting report by police captain that officer's conduct was contrary to training); *Herrick v. Fairchild Corp.*, 298 F.3d 1184, 1192 (10th Cir. 2002) (advisory committee notes to Rule 803(8) indicate that intent of drafters was to allow admission of investigations by officials in executive branch). *See also Keith v. Volpe*, 858 F.2d 467, 481 (9th Cir. 1988) (presumption is one of trustworthiness, with burden of establishing untrustworthiness on opponent of the evidence).

has so many policies that he can not remember them all, but he later acknowledged that the department has written policies which pertain to identification of persons being booked. In fact, Sheriff's Office Policy 103.02 provides as follows: "If there is any doubt about the identity of a person, conflicting data, or insufficient information on the Journal Entry, the Booking Sergeant will be contacted." *See* General Order, attached as Ex. V to *Defendants' Memorandum.* Sheriff's Office Policy 107.00 also provides that when an inmate's identity is not "immediately verifiable," he or she may be accepted under the name of "John or Jane Doe." It further provides that the Records Section will be notified and a set of fingerprints will be taken to make a positive identification. *See* General Order, attached as Ex. W to *Defendants' Memorandum.*

Undersheriff Hinshaw testified that unwritten policy and deputy training in the Sheriff's Department require reasonable measures to verify that the correct person is in custody. *See* Hinshaw Depo. at 12-13, 76-77, attached as Ex. O to *Defendants' Memorandum;* Investigation Report of Major Hinshaw at 5-6, attached as Ex. P to *Defendants' Memorandum.* Sergeant Nelson testified that "if somebody says they ain't the person . . . you kind of check to see pictures or mugs[.]" Nelson Depo. at 47, attached as Ex. X to *Defendant's Memorandum.*

Some time after plaintiff's first appearance, his family retained private defense counsel. Between December 6 and 15, 2005, the public defender and/or

private counsel visited plaintiff six times. Neither attorney brought any mistaken identity to the attention of the Sheriff's Department. *See* Investigation Report of Major Hinshaw, attached as Ex. P to *Defendants' Memorandum* at 6. On December 15, however, one of plaintiff's attorneys told the assistant district attorney about the mistaken identity. Later that day, defendants released plaintiff.

During his two-week detention, except through the inmate request form and his statement to the booking technician, plaintiff made no effort to notify the Sheriff's Department of the mistaken identity. *See* Plaintiff's Depo. at 248-49, attached as Ex. C to *Defendants' Memorandum.* Plaintiff prepared additional inmate request forms on December 7 and 9, 2005, requesting items from the commissary. Neither request mentioned mistaken identity.

Sheriff Steed and Undersheriff Hinshaw had no direct contact with plaintiff during his detention.

In February of 2006, law enforcement officials in Pensacola, Florida informed the Sheriff's Department that they had arrested the fugitive on a drug charge on August 26, 2005, and released him on time served on January 3, 2006.

Under 42 U.S.C. § 1983, plaintiff claims that in his official capacity, Sheriff Steed – by detaining him for two weeks on an arrest warrant for another man – violated (1) his right to be free of unreasonable government seizures under the Fourth Amendment and (2) his right to substantive due process under the

Fourteenth Amendment. Defendants assert that the Board is entitled to summary judgment on plaintiff's Section 1983 claims because it is not responsible for the Sheriff's conduct. Defendants also argue that Sheriff Steed is entitled to summary judgment because (1) plaintiff had no constitutional right to a post-arrest investigation; (2) plaintiff cannot show that the Sheriff's policy or custom caused a constitutional violation and (3) plaintiff cannot show that Sheriff Steed acted recklessly or was grossly negligent in a supervisory capacity.[8]

Under Kansas common law, plaintiff asserts that the Board, Sheriff Steed and Undersheriff Hinshaw (1) falsely imprisoned him for two weeks on an arrest warrant for another man and (2) negligently failed to train staff to identify persons named in warrants. Defendants assert that they are entitled to summary judgment on plaintiff's false imprisonment claim because (1) plaintiff's detention was lawful or (2) they are entitled to immunity under the discretionary function exception, K.S.A. § 75-6104(e). Defendants

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[8] Sheriff Steed and Undersheriff Hinshaw also assert that they are entitled to summary judgment because they are entitled to qualified immunity. Under the doctrine of qualified immunity, government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity only relieves defendants of individual liability, however, and plaintiff brings only official capacity claims. The Court therefore need not address the qualified immunity defense.

assert that they are entitled to summary judgment on plaintiff's negligence claim because negligent conduct which results in false arrest or imprisonment only gives rise to a cause of action for false arrest or imprisonment.

Analysis

I. Section 1983 Claims

A. Eleventh Amendment Issues

Plaintiff does not assert a Section 1983 claim against anyone but Sheriff Steed in his official capacity.[9] In all respects other than name, an official-capacity suit is a suit against the entity. *Kentucky v. Graham,* 473 U.S. 159, 166 (1985); *Moore v. City of Wynnewood,* 57 F.3d 924, 929 n.4 (10th Cir. 1995). It is not entirely clear, however, whether Sheriff Steed is an officer of the county or of the State of Kansas. *See Moore v. Bd. of County Commr's of Leavenworth County,* 470 F. Supp. 2d 1237, 1255-56 (D. Kan. 2007) (comparing *Bd. of County Comm'rs of Lincoln County v. Nielander,* 275 Kan. 257, 261 (2003) (sheriff is state officer whose duties, powers and obligations derive from legislature), with *Schroeder v. Kochanowski,* 311 F. Supp. 2d 1241, 1249 n.23 (D. Kan. 2004) (rejecting

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[9] Plaintiff alleges that "defendant sheriff, in his official capacity, deprived plaintiff of [his rights under the Fourth and Fourteenth Amendments] by or though his department's custom or policy." *Pretrial Order* (Doc. #32) filed March 4, 2008, ¶¶ b(1)(b), b(2)(b).

argument that sheriff is state official and that Eleventh Amendment therefore bars claim against him). If Sheriff Stead is an officer of the county, an official capacity suit against him is equivalent to an action against the Board of County Commissioners, *i.e.* the County. *See id.* at 1245 n.17 (official capacity claims against sheriff equivalent to action against county). On the other hand, if Sheriff Steed is an officer of the State of Kansas, an official capacity suit against him is equivalent to an action against the State, and the Court must examine whether the Eleventh Amendment bars plaintiff's official capacity claims against him.[10]

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[10] Sheriff Steed did not claim Eleventh Amendment immunity in this case, but the Eleventh Amendment has jurisdictional attributes and may be raised at any point. *See Edelman v. Jordan,* 415 U.S. 651, 677-78 (1974); *Ambus v. Granite Bd. of Educ.*, 975 F.2d 1555, 1559 (10th Cir. 1992), *modified on other grounds on reh'g,* 995 F.2d 992, 994 (10th Cir. 1993). The summary judgment briefs do not address whether Sheriff Steed is entitled to Eleventh Amendment immunity, or whether the State of Kansas had waived any such immunity. Because the Eleventh Amendment immunity implicates subject matter jurisdiction, however, the Court may address it *sua sponte. See Johns v. Stewart,* 57 F.3d 1544, 1552-53 (10th Cir. 1995). Therefore, on June 25, 2008, the Court ordered plaintiff to show cause why it should not find that the Eleventh Amendment barred his claim against Sheriff Steed in his official capacity. *See Order To Show Cause* (Doc. #60) at 4-5.

The Eleventh Amendment bars a request for money damages against a state defendant in his official capacity. *See White v. Colorado,* 82 F.3d 364, 366 (10th Cir. 1996); *Meade,* 841 F.2d at 1529 n.17 (Eleventh Amendment sovereign immunity bars actions for damages against state officers in official capacities).

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Only a state, however, or the "arms" of a state, may assert the Eleventh Amendment as a defense to suit in federal court. *Ambus*, 975 F.2d at 1560.

In *Hunter v. Young*, 238 Fed. Appx. 336, 338 (10th Cir. 2007) (unpublished), the Tenth Circuit implicitly found that a county sheriff is an officer of the State of Kansas. In *Hunter*, plaintiff asserted that the State of Kansas had waived any Eleventh Amendment immunity by enacting K.S.A. § 19-811, which provides that a sheriff has "charge and custody of the jail of his county" and that the sheriff and his sureties shall be liable for the acts of his deputies or jailers. *Id.* at 338 (citing K.S.A. § 19-811). The Tenth Circuit ruled that "[t]his general language cannot be reasonably construed as a waiver of Kansas's immunity against § 1983 prisoner claims in the federal courts." *Id.* It concluded that because plaintiff had requested only monetary damages, sovereign immunity barred his claim against a sheriff's officer in his official capacity. *See id.* Before *Hunter*, cases from this district had come to the opposite conclusion on this question. *See Schroeder*, 311 F. Supp. 2d at 1250, n.23 (no Tenth Circuit cases hold that county sheriff is state official); *cf. Fugate v. Unified Gov't Of Wyandotte County/Kansas City*, Kan., 161 F. Supp. 2d 1261, 1266 (D. Kan. 2001) (county sheriff's department is agency of county).

Plaintiff persuasively argues that *Hunter* is not binding because it is an unpublished opinion and contains virtually no analysis. *See Response Of Plaintiff Francisco Reyes To Court's Show Cause Order On Eleventh Amendment Immunity* (Doc. #61) filed June 27, 2008 at 6-8; *see* Rule 32.1, 10th Cir. R. App. P (unpublished decisions not binding precedent but "may be cited for their persuasive value"). The Court notes that whether a Kansas sheriff is entitled to Eleventh Amendment immunity is a close question, as reflected by cases which avoid the question or reach varying results. Further, with all respect to the Tenth Circuit, *Hunter* is not necessarily persuasive because it did not address the relevant four-factor analysis under *Steadfast Ins. Co. v. Agric. Co.*, 507 F.3d 1250, 1252-53 (10th Cir. 2007).

To determine whether Sheriff Steed is an arm of the State, the Court must conduct a four-factor inquiry, taking into account (1) how the entity is characterized under state law; (2) the entity's degree of autonomy; (3) the sources of the entity's operating funds; and (4) whether the entity deals primarily with local or state concerns. *Steadfast Ins. Co. v. Agric. Co.*, 507 F.3d 1250, 1252-53 (10th Cir. 2007); *see Ambus*, 975 F.2d at 1561-62. In *McMillan v. Monroe County*, 520 U.S. 781 (1997), the Supreme Court applied a similar four-part test to determine whether a sheriff is a state or county policymaker for purposes of Section 1983 municipal liability.[11] The Supreme Court stressed that the question is not whether the sheriff acts for the state or the county in some categorical, "all or nothing" manner, but rather

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[11] In *McMillan* the Supreme Court found that under Alabama law, the sheriff was a law enforcement policymaker for the State of Alabama, not the county. 520 U.S. at 793. *McMillan* set out a four part test similar to that which the Tenth Circuit applies to the Eleventh Amendment inquiry: (1) how state law defines the entity; (2) what degree of control the state maintains over the entity; (3) the source of the entity's funds; and (4) who bears financial responsibility for judgments entered against the entity. *Id.* at 787-792. While the "policymaker" question is a statutory one governed by Section 1983, the arm-of-the-state analysis flows from Eleven Amendment principles. *Will v. Michigan Dep't of State Police*, 491 U.S. 66-67 (1989). The Supreme Court has recognized that these are separate inquiries but "in deciphering congressional intent as to the scope of § 1983, the scope of the Eleventh Amendment is a consideration, and we decline to adopt a reading of § 1983 that disregards it." *Id.*

whether the sheriff acted for the state in a particular area, or on a particular issue. *Id.* at 785. Here, the inquiry focuses on whether Sheriff Steed represented the State or the county when he determined policy for identifying and detaining prisoners on warrants issued from Sedgwick County.

As for the first factor, how state law characterizes the sheriff, plaintiff cites Kansas cases and statutes which indicate that sheriffs are county rather than state officials. Indeed, K.S.A. § 25-101 lists positions which are historically considered "county offices," including the county sheriff.[12] *See Wall v. Harrison,* 201 Kan. 600, 603-04 (1968). The county has authority to establish a jail, K.S.A. § 19-1901, and the sheriff has charge and custody of the jail of his county, *see* K.S.A. § 19-811. If a county has no sheriff, the county clerk performs the statutory duties of the office.[13] *See* K.S.A. § 19-804a.

As for the second factor, the degree of the sheriff's autonomy from the State, the Kansas Supreme Court in *Nielander* noted that county sheriffs enjoy autonomy in personnel decisions within their departments, and the sheriff has charge of the county jail.

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[12] By contrast, the statute which creates the position of district attorney states that the district attorney "in no event . . . shall be deemed an officer of any county." K.S.A. § 22a-101(a). The legislature has attached no similar declaration to the office of county sheriff.

[13] If a county sheriff were an arm of the state, a state official would presumably act as the surrogate.

See 275 Kan. at 263; K.S.A. § 19-811. Defendant points out that the Kansas Attorney General (and the county attorney) may initiate an action to oust a sheriff for failure to perform law enforcement functions. *See* K.S.A. §§ 8-605 and 60-1202. Further, the sheriff must accept and take possession of prisoners committed by a judge of any city or county. *See* K.S.A. §§ 19-1916, 19-1930; *see also* K.S.A. § 19-1917 (sheriff required to jail fugitives from another state or territory). Kansas courts across the state may direct sheriffs to issue process and writs, bring prisoners before them and incarcerate individuals. *See, e.g.*, K.S.A. § 19-812 (sheriff to serve and execute all lawful process, writs, precepts and orders); K.S.A. § 20-107 (sheriff to issue Kansas Supreme Court process and writs); K.S.A. § 20-363(a) (sheriff to serve process for district courts); K.S.A. § 22-3427 (sheriff to confine prisoners); K.S.A. § 43-166 (sheriff to serve jury summons). On balance, however, it appears that in setting policy for the county jail and – in particular – setting policy for identifying and detaining prisoners on warrants from Sedgwick County, the sheriff of Sedgwick County enjoys significant autonomy from state control.

The third factor, the source of the sheriff's operating funds, clearly supports a finding that the sheriff is not an arm of the State. By statute, the board of county commissioners must approve the sheriff's annual budget, and the county – not the State – provides operating funds for the sheriff. *See* K.S.A. § 19-805(a), (b), (c). Also, the sheriff may

collect revenue for the county for housing the prisoners of municipalities. K.S.A. § 19-1930.

As for the fourth factor, whether the sheriff deals primarily with local or state concerns, Kansas statutes authorize sheriffs and their deputies to conduct law enforcement activities within their counties; they may act elsewhere in the state only in fresh pursuit of a suspect or if another agency requests assistance. *See* K.S.A. § 22-2401a(1). By contrast, Kansas Bureau of Investigation agents and Kansas Highway Patrol troopers exercise law enforcement powers anywhere in the State. The geographical limitation on a county sheriff's law enforcement powers suggests that the office is local in nature. *See Eames v. Bd of County Comm'rs of Phillips County,* 733 F. Supp. 322, 324 (D. Kan. 1990) (sheriff and deputies are employees of county they serve). As noted, the sheriff must accept into the county jail prisoners from other counties and states. Such prisoners are not local concerns, but for purposes of operating the jail and setting policy for identifying and detaining prisoners on warrants from Sedgwick County, it appears that the sheriff primarily deals with local concerns.

Based on the foregoing four factors, the Court finds that for purposes of setting policy for identifying and detaining prisoners on warrants from Sedgwick County, the sheriff acts as an arm of the county, and

not the State.[14] As such, he is not entitled to Eleventh Amendment immunity. *Cf. Nielander,* 275 Kan. at 261 (position of sheriff coextensive with county board; each functions as local political entity established through enabling legislation with neither being subordinate to other). *Id.*

To the extent that Sheriff Steed is considered an officer of Sedgwick County, plaintiff's official capacity claim against him is actually a claim against Sedgwick County. *See Monell v. Dep't of Soc. Servs. of City of New York,* 436 U.S. 658, 691 n.55 (1978) (official capacity suits simply another way of pleading action against entity of which officer is agent). The Court therefore treats the claim as one against Sedgwick County, and it need not further address the question of Eleventh Amendment immunity.

B. Plaintiff's Section 1983 Claim Against The County

Municipal liability under Section 1983 does not automatically spring from the acts of municipal employees, *Pembaur v. City of Cincinnati,* 475 U.S. 469, 478 (1986), but results when the municipality itself causes the wrong. Such wrongs may arise from official policy, *e.g.* "acts which the [county] has officially sanctioned or ordered," or from the act of an

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[14] For these same reasons, the Court finds as a matter of law that Sheriff Steed is an ultimate county decision-maker with regard to such policy.

ultimate county decision-maker. *Pembaur,* 475 U.S. at 479-80. To create liability against a local governmental body under Section 1983, plaintiff must show (1) a constitutional violation and (2) an official policy or custom which was the moving force behind the violation. *City of Oklahoma City v. Tuttle,* 471 U.S. 808, 820 (1985)). The challenged policy or custom need not be formal or written, *Watson v. City of Kansas City,* 857 F.2d 690, 695 (10th Cir. 1988), but plaintiff must establish a direct causal link between the government action and the deprivation of federal rights. *Bd. of County Comm'rs v. Brown,* 520 U.S. 397, 404 (1997) (must demonstrate that unconstitutional actions resulted from policy or custom adopted or maintained with deliberate indifference to constitutional rights).

The Board asserts that it is entitled to summary judgment because plaintiff does not have the right to a post-arrest investigation under the Fourth Amendment or the substantive due process guarantees of the Fourteenth Amendment. The Board also argues that even if plaintiff had such rights, he has not raised a genuine issue of material fact whether the County violated those rights. *See Myers v. Oklahoma County Bd. of County Comm'rs,* 151 F.3d 1313, 1316-17 (10th Cir. 1998) (regardless of governmental policies, no liability where officers inflict no constitutional harm); *Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 694 (1978) (to establish cause of action under Section 1983, plaintiff must prove deprivation of federal right).

1. Constitutional Violation

As a preliminary matter, the Court notes that the law is not clear as to the appropriate constitutional provision under which plaintiff's Section 1983 claims are properly analyzed. *Cf. Becker v. Kroll,* 494 F.3d 904, 913 (10th Cir. 2007) (case required court to "wade into murky waters" of Section 1983 malicious prosecution claims).[15] Plaintiff's constitutional claims

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[15] Section 1983 provides a civil cause of action against state officials for the "deprivation of any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983. Section 1983 claims are often analytically similar to – although distinct from – common law torts such as false arrest or malicious prosecution. *See id.* (malicious prosecution); *Smith v. Plati,* 258 F.3d 1167, 1174 (10th Cir. 2001) (false arrest). Courts therefore use the common law of torts as a starting point for determining the contours of constitutional claims under Section 1983. *See Pierce v. Gilchrist,* 359 F.3d 1279, 1286 (10th Cir. 2004); *Becker,* 494 F.3d at 913-14 (not all Section 1983 actions have common law analog, and no Section 1983 action depends entirely on a common law analog to define its elements).

In the context of false arrest and false imprisonment, the Tenth Circuit has ruled that to establish a constitutional violation, plaintiff must do more than allege a state law claim of false arrest; plaintiff must establish what the Tenth Circuit sometimes terms a *substantive due process* claim. *See Smith,* 258 F.3d at 1174-75 (under state common law, slightest interference with personal liberty is false imprisonment but not all such invasions activate remedies under due process clause of Fourteenth Amendment). On the other hand, the Tenth Circuit has stated that Fourteenth Amendment substantive due process standards "have no applicability" to a claim of wrongful pretrial detention. *See Taylor v. Meacham,* 82 F.3d 1556, 1559-60 (10th Cir. 1996) (unclear how far Fourth Amendment protection against unreasonable seizures can reach in pretrial context but "seizure" issue fairly straightforward where plaintiff remained

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are predicated on factual argument that defendants detained him for two weeks on an arrest warrant for another man. In *Romero v. Fay*, 45 F.3d 1472, 1480 (10th Cir. 1995), the Tenth Circuit invoked the Fourteenth Amendment in analyzing a Section 1983 claim that defendants denied plaintiff the right to a reasonable post-arrest investigation after they arrested and detained him, without a warrant, based on mistaken identity.[16] Although *Romero* involved a

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in detention and was effectively seized throughout time period in question); *see also Albright v. Oliver*, 510 U.S. 266 (1994) (Fourth Amendment governs pretrial deprivations of liberty because where particular amendment provides explicit textual source of constitutional protection against particular government behavior, that amendment – not more generalized notion of substantive due process – must guide analysis); *Becker*, 494 F.3d at 919 (Fourth Amendment protects liberty interests by ensuring that arrest is reasonable; more general due process considerations of Fourteenth Amendment not fallback to protect interests more specifically addressed by Fourth Amendment). Further, the Tenth Circuit has stated that an "initial seizure is governed by the Fourth Amendment, but at some point after arrest, and certainly by the time of trial, constitutional analysis shifts to the Due Process Clause." *Pierce*, 359 F.3d at 1285-86 (plaintiff imprisoned without legal process has claim under Fourth Amendment analogous to tort claim for false arrest or false imprisonment; if imprisoned due to wrongful process, plaintiff has claim under Fourteenth Amendment due process clause analogous to tort claim for malicious prosecution).

[16] In *Romero*, plaintiff also asserted that police arrested him without probable cause in violation of his Fourth Amendment rights. *See Romero*, 45 F.3d at 1474. The district court found that defendants were not entitled to qualified immunity because they had arrested plaintiff without probable cause. *Id.* at 1474-75. The Tenth Circuit reversed, finding that plaintiff had not set

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warrantless arrest, and plaintiff here was arrested on a warrant, officers in both cases had probable cause for the arrest. *Romero* thus suggests that plaintiff's claim of unlawful pretrial detention is within the ambit of the Fourteenth Amendment and is not properly analyzed under the Fourth Amendment.[17]

On the other hand, in *Baker v. McCollan,* 443 U.S. 137, 143 (1979), the Supreme Court dismissed a Fourteenth Amendment claim that defendants had intentionally failed to "investigate and determine that the wrong man was imprisoned." *Id.* In *Baker,* plaintiff's brother was masquerading as plaintiff and a judge issued an arrest warrant for the brother in plaintiff's name. Police arrested plaintiff, despite his protests of mistaken identity, and held him for three days before they discovered that he was the wrong person. Plaintiff claimed that the county sheriff had denied him rights pursuant to the Fourteenth Amendment. *Id.* at 141. The Supreme Court disagreed, holding that the plaintiff had not established the deprivation of a constitutional right. Because plaintiff focused exclusively on his prolonged detention without adequate identification procedures, the

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forth facts to show an arrest without probable cause. *Id.* at 1477-78.

[17] To further complicate the analysis, many of the relevant cases refer generally to a "Fourteenth Amendment right" without explicitly identifying the right to which they refer: an incorporated Fourth Amendment right, a substantive due process right and/or a procedural due process right.

Supreme Court presumed that plaintiff asserted a violation of Fourteenth Amendment protections against deprivations of liberty without due process of law.[18] *Id.* The Supreme Court held that as a matter of law, plaintiff's confinement for three days in the county jail did not deny him liberty without due process. It reasoned as follows:

> The Fourteenth Amendment does not protect against all deprivations of liberty. It protects only against deprivations of liberty accomplished "without due process of law." A reasonable division of functions between law enforcement officers, committing magistrates, and judicial officers – all of whom may be potential defendants in a § 1983 action – is entirely consistent with "due process of law." Given the requirements that arrest be made only on probable cause and that one detained be accorded a speedy trial, we do not think a sheriff executing an arrest warrant is required by the Constitution to investigate independently every claim of innocence, whether the claim is based on mistaken identity or a defense such as lack of requisite intent. Nor is the official charged with maintaining custody of the accused named in the warrant required by the Constitution to perform an

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[18] The Supreme Court noted that plaintiff did not claim that the initial arrest was constitutionally deficient and that, in any event, the arrest did not violate the Fourth Amendment because it was pursuant to a "facially valid warrant." *Baker*, 443 U.S. at 144.

> error-free investigation of such a claim. The ultimate determination of such claims of innocence is placed in the hands of the judge and the jury.

443 U.S. at 145-46. In dicta, however, the Supreme Court observed that "[o]bviously, one in respondent's position could not be detained indefinitely in the face of repeated protests of innocence even though the warrant under which he was arrested and detained met the standards of the Fourth Amendment." 443 U.S. at 144.

The scenario which *Baker* anticipated in dicta came before the Tenth Circuit in *Romero,* which involved protracted detention and repeated protests of innocence sufficient to invoke a Fourteenth Amendment – rather than a Fourth Amendment – analysis. In *Romero,* an officer arrested Romero based on interviews with two women who implicated him in a homicide. 45 F.3d at 1474. Romero repeatedly professed his innocence and named witnesses who could exonerate him. The officer refused to inter view any of the witnesses, however, and defendants held Romero for three months before they asked prosecutors asked to dismiss the charge. *Id.* Romero filed a Section 1983 action alleging violations of his Fourteenth Amendment rights.[19] *Id.* Specifically,

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[19] As noted *supra,* plaintiff also asserted that police arrested him without probable cause in violation of his Fourth Amendment rights. *See Romero,* 45 F.3d at 1474. The district court found that defendants had arrested plaintiff without probable

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he contended that defendants violated his federal constitutional rights by conducting an unreasonable post-arrest investigation and falsely imprisoning him for three months when he repeatedly protested his innocence. The Tenth Circuit disagreed, holding that plaintiff had not alleged a constitutional violation. The Tenth Circuit noted that a police officer does not violate the Fourteenth Amendment merely by arresting an individual who happens to be innocent. *Id.* at 1480 (citing *Baker,* 443 U.S. at 145) (Constitution does not guarantee that only guilty will be arrested); *See also Edwards v. Baer,* 863 F.2d 606, 607 (8th Cir. 1988) (mere fact of invalid arrest does not ordinarily convert common law tort of false arrest or false imprisonment to violation of constitutional right). Instead, to state a claim for violation of Section 1983, plaintiff must specifically allege that the government official acted with deliberate or reckless intent to falsely imprison him. *Romero,* 45 F.3d at 1480. The Tenth Circuit found that at

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cause and were not entitled to qualified immunity. *Id.* at 1474-75. The Tenth Circuit reversed, finding that plaintiff had not set forth facts to show an arrest without probable cause. *Id.* at 1477-78. In challenging his three-month detention after the arrest, Romero framed the constitutional issue as one arising under the Fourteenth Amendment, rather than the Fourth Amendment. The Tenth Circuit did not expressly repudiate the Fourth Amendment as the proper frame of reference, but it followed plaintiff's argument in analyzing his claims under the Fourteenth Amendment.

most plaintiff had shown negligent conduct, not deliberate or reckless intent to falsely imprison him.[20]

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[20] Plaintiff relies heavily on cases from other circuits which conclude that officers act unconstitutionally when they refuse to investigate or release a person who has been wrongfully arrested on a warrant which names someone else. *See, e.g., Fairley v. Luman,* 281 F.3d 913, 918 & n.6 (9th Cir. 2002) (Fourteenth Amendment procedural due process violation where jail held plaintiff for 12 days on warrants for identical twin; plaintiff repeatedly protested detention and told booking officer he had twin); *Lee v. City of Los Angeles,* 250 F.3d 668 (9th Cir. 2001) (two-year detention of obviously mentally disabled man who shared no physical characteristics with person named on warrant violated Fourth Amendment and Fourteenth Amendment due process clause); *Cannon v. Macon County,* 1 F.3d 1558 (11th Cir. 1993) (three-month detention on warrant for woman with different social security number and date of birth, and who had significant physical differences from fugitive and repeatedly protested detention, violated substantive due process under Fourteenth Amendment), *modified on rehearing on other grounds,* 15 F.3d 1022 (1994); *see also Atkins v. City of Chicago,* 441 F. Supp. 2d 921 (N.D. Ill. 2006) (37-day detention of plaintiff who repeatedly protested detention, whose information differed from suspect's in most respects except for name, and who never appeared before judge violated Fourteenth Amendment). In these cases, however, defendants provided inadequate procedures to address the identification and detained plaintiffs for lengthy periods despite repeated protests of innocence; furthermore, at the minimum, the courts required proof of deliberate indifference to establish a constitutional violation.

In *Reyes v. Board of County Commissioners of Araphahoe* [sic] *County* – a case which addressed this plaintiff's detention in Arapahoe County, Colorado – the United States District Court for the District of Colorado distinguished *Farley, Lee* and *Cannon,* as follows:

> These cases in general involve repeated protestations by the arrestee, significant differences between the

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Id. at 1481.[21]

> wanted fugitive's and the arrestee's identifying information, extended detentions and/or other extraordinary circumstances not present here (*e.g.* mental disability, knowing concealment). In contrast, the circumstances here present at most negligence, in that the officers could have discovered that Plaintiff was not the wanted fugitive if they had taken further investigative steps. All the cited cases, taken together, show that a wilful refusal to verify a repeated claim of mistaken identity over an extended period of time could support a claim, but none stand for the proposition that the mere failure to discover the error is a constitutional violation in circumstances where the arrestee matches the fugitive in many respects and has the ability and opportunity, including a court hearing, to bring the mistake to light but does not.

No. 06-2319, 2008 WL 961565 at *5 (D. Colo. Apr. 8, 2008); *see also Rudkin v. Sedgwick County*, 469 F. Supp. 2d 953, 959 (D. Kan. 2007) (right to be free from pre-trial detention absent probable cause not among substantive due process rights).

[21] Citing *Baker*, 443 U.S. at 145-46, the Tenth Circuit noted that defendants had no obligation to release plaintiff merely because he said he was innocent. It stated that "the Supreme Court's observations in *Baker* regarding claims of innocence after an arrest supported by an arrest warrant apply by analogy to claims of innocence after a warrantless arrest." *Romero*, 45 F.3d at 1480.

Defendant asserts that *Romero* is analogous because Colorado authorities had probable cause for plaintiff's arrest and Sedgwick County jail staff had no obligation to continue an investigation after that arrest. Plaintiff contends that *Romero* is distinguishable because it involved a warrantless arrest, and he was arrested on a warrant issued for someone else. As in *Romero* and *Baker*, however, this case involves the detention of an innocent person arrested with probable cause, and the Court finds no basis on which to distinguish it. *See also Scull v. State*

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In cases which allege deprivation of rights by post-arrest detention, at least two circuits have analyzed the claims under the Fourth Amendment. In *Lee v. City of Los Angeles, supra,* Kerry Sanders alleged that defendants violated his Fourth and Fourteenth Amendment rights when they arrested him on a warrant for Robert Sanders and held him for two years without a hearing. The district court dismissed both constitutional claims under Rule 12(b)(6). The Ninth Circuit reversed, finding that plaintiff stated both a Fourth and a Fourteenth Amendment claim. As to the Fourth Amendment claim, defendants lacked probable cause to arrest plaintiff because no reasonable police officer could have believed that Kerry Sanders was the same person as Robert Sanders. *Lee,* 250 F.3d at 684. Moreover, defendants "recklessly and with deliberate indifference" to plaintiff's constitutional rights failed to check fingerprints and other characteristics and

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of New Mexico, 236 F.3d 588, 598 (10th Cir. 2000) (where plaintiff arrested on facially valid warrant, jailers have no constitutional duty to independently investigate claims of innocence); *Rudkin,* 469 F. Supp. 2d at 956-57 (person detained as result of mistaken identity suffers no violation of substantive due process rights); *Echols v. Unified Gov't of Wyandotte County,* 399 F. Supp. 2d 1201 (D. Kan. 2005) (no Fourth Amendment duty to investigate detainee's claim of innocence if he was arrested on facially valid warrant), *cf. Brady v. Dill,* 1897 F.3d 104, 155 n.10 (1st Cir. 1999) (suggesting in dicta that if police were to misexecute warrant, *i.e.* arrest someone other than person named in warrant because of mistaken identities, different case would arise).

compare them to those of Robert Sanders. *See id.* at 668. As for the Fourteenth Amendment claim, the Ninth Circuit relied upon dicta from *Baker* that depending on what procedures the state afforded defendants following arrest and prior to trial, detention pursuant to a valid warrant "after the lapse of a certain amount time" gives rise to a due process claim under the Fourteenth Amendment. *See id.* at 683 (quoting *Baker,* 443 U.S. at 145).

In *Russo v. City of Bridgeport,* 479 F.3d 196 (2d Cir. 2007), the Second Circuit found that an officer violated plaintiff's Fourth Amendment rights by withholding and concealing exculpatory evidence that plaintiff, who had been arrested pursuant to valid warrant, was not the person who committed the crime. The Second Circuit found that while plaintiff remained incarcerated for 217 days, police violated a duty "to investigate specific, readily-verifiable claims of innocence in a reasonable time period" by intentionally failing to view a videotape which conclusively exonerated plaintiff. *Id.* at 209. Although plaintiff alleged violation of a substantive due process right under the Fourteenth Amendment, the Second Circuit found that the right should be analyzed under the Fourth Amendment, *see Graham v. Connor,* 490 U.S. 386 (1989), because it provided an explicit textual source of constitutional protection against the particular sort of government behavior involved in that case. *Russo,* 479 F.3d at 208. More specifically, the Second Circuit found that when an accused is physically detained following arraignment, he has

been seized within the meaning of the Fourth Amendment. *See id.* (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 844 (1998) (Fourth Amendment seizure occurs when government terminates freedom of movement through means intentionally applied); *Albright*, 510 U.S. at 274 (Fourth Amendment addresses pretrial deprivations of liberty). Citing the length of time of wrongful incarceration, the ease with which officers could have checked the exculpatory evidence and the alleged intentionality of their behavior, the Second Circuit determined that plaintiff had sufficiently alleged an unreasonable seizure, *i.e.* an intentional violation of – or deliberate indifference to – his constitutional rights. *Russo*, 475 F.3d at 209. The Second Circuit concluded that the evidence of shocking conduct on the part of the officers was sufficient to preclude a grant of summary judgment in their favor on plaintiff's unreasonable seizure claim.

Bearing these cases in mind, the Court now addresses whether plaintiff has set forth evidence that the County violated his constitutional rights under the Fourth or Fourteenth Amendment.

a. Fourth Amendment

Plaintiff claims that by detaining him in the Sedgwick County jail for two weeks on a warrant for another man, the County (through Sheriff Steed in his official capacity) violated his Fourth Amendment right to be free from unreasonable seizures. The County asserts that it is entitled to summary

judgment because (1) plaintiff had no Fourth Amendment right to a post-arrest investigation; (2) if he had such a right, plaintiff has not shown that any defendant violated it and (3) plaintiff cannot show that county policy or custom caused the violation.

As noted, plaintiff asserts that the custom or policy of the Sheriff's Department violated his rights under the Fourth Amendment. In other words, plaintiff asserts that defendant is liable because the custom or policy of the Sheriff's Department was the driving force behind the constitutional violation, *i.e.* that jail personnel implemented a policy or custom of detaining persons arrested on warrants without investigating claims of mistaken identity, and that the execution of this policy or custom inflicted the injuries of which he complains. A local governing body may be directly liable under Section 1983 where the unconstitutional action implements a policy of the government entity. *See Garcia v. Salt Lake County,* 768 F.2d 303, 307 (10th Cir. 1985) (when execution of governmental policy or custom inflicts injury, government as entity is responsible under Section 1983).

Although the general standard for a Fourth Amendment violation is reasonableness, the Tenth Circuit and other courts have found that to establish a Section 1983 claim for false arrest, plaintiff must show that defendant acted with deliberate or reckless intent to falsely imprison him. *See Romero,* 45 F.3d at 1478, 1480-81 (negligent failure to conduct post-arrest investigation did not render arrest unreasonable); *Russo,* 479 F.3d at 209-210 (requiring intentional

violation or deliberate indifference which "shocks the conscience" as crucial feature going to unreasonableness of the seizure);[22] *see also Lee,* 250 F.3d at 684

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[22] The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The Fourth Amendment protects the privacy and security of individuals against arbitrary invasions by the government. *New Jersey v. T.L.O.,* 469 U.S. 325, 335 (1985). For purposes of the Fourth Amendment, a seizure is unconstitutional if it is unreasonable. A seizure is reasonable if it is justified at its inception, and reasonably related in scope to the circumstances which justified the interference in the first place. *Edwards ex rel. Edwards v. Rees,* 883 F.2d 882, 884 (10th Cir. 1989) (citing *T.L.O.,* 469 U.S. at 341).

Courts have found that an arrest on a warrant for another may be reasonable. *See Hill v. Scott,* 349 F.3d 1068, 1072-1073 (8th Cir. 2003) (given remarkably similar descriptions of two Brian Hills, officers reasonably mistook one for other in executing warrant; not unreasonable to fail to check date of birth); *Rodriguez v. Farrell,* 280 F.3d 1341, 1348 (11th Cir. 2002) (no Fourth Amendment violation where police arrested on warrant person with same name, sex, age, state of birth and race and similar social security number, notwithstanding four-inch discrepancy in height); *United States v. Marshall,* 79 F.3d 68, 69 (7th Cir. 1996) (arrest pursuant to warrant for Raymond Beasley reasonable, given defendant's resemblance to Beasley and fact that woman who claimed to know Beasley identified his photograph then identified defendant); *White v. Olig,* 56 F.3d 817, 820-21 (7th Cir. 1995) (person arrested had same name, race, county of residence, birth date and approximate weight as person named in warrant and indicated that he knew what warrant was about); *United States v. McEachern,* 675 F.2d 618, 622 (4th Cir. 1982) (arrest of defendant pursuant to arrest

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(applying "recklessly and with deliberate indifference standard" to unreasonable seizure claim). Under this standard, plaintiff has not shown that the County violated his Fourth Amendment rights.

Plaintiff asserts that Sheriff Department employees acted with deliberate indifference to "a very real, very tangible likelihood" that he was not the wanted man and that their failure to conduct a fingerprint comparison evinces a patent disregard of his Fourth Amendment rights. To succeed on his theory of liability, however, plaintiff must show that the employees' conduct was pursuant to municipal policy, and that the *policy* was deliberately indifferent to the risk of a constitutional violation. *See Garcia,* 768 F.2d at 309. As noted, the Sheriff's Department has written policies pertaining to identification of detainees. Those policies include (1) "[i]f there is any doubt about the identity of a person, conflicting data, or insufficient information on the Journal Entry, the Booking Sergeant will be contacted" and (2) "when an inmate's identity is not 'immediately verifiable,' he or she may be accepted under the name of "John or Jane Doe" and the Records Section will be notified and a set of fingerprints will be taken to make a positive identification." Further, unwritten policy requires reasonable measures to verify that the correct person is in custody, such as checking pictures or mugshots.

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warrant for brother lawful where police had reasonable but mistaken belief defendant was subject of warrant).

Although the jail employees apparently did not follow these policies, operational error does not support municipal liability. *See Monell,* 436 U.S. at 691. It bears noting that plaintiff waived extradition to Kansas and at his extradition hearing never mentioned that he was not the person named in the warrant. Further, at his first appearance within 24 hours after he arrived at the Sedgwick County jail, plaintiff did not tell the judge that he was not the man named on the warrant.[23] Even viewing the record in a light most favorable to plaintiff, the record does not reveal a genuine issue of material fact whether defendant's policy (as opposed to operational error or plaintiff's failure to effectively communicate his claim of mistaken identity) was the driving force behind plaintiff's detention. As a result, plaintiff has not shown a violation of his Fourth Amendment rights.[24]

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[23] The Supreme Court has found that the Fourth Amendment allows police up to 48 hours to take a suspect to court. *See County of Riverside v. McLaghlin,* 500 U.S. 44 (1991). Here, defendant took plaintiff to court within 24 hours.

[24] In his complaint, plaintiff specifically alleges a failure to train. Also, in opposition to defendants' motion for summary judgment, plaintiff argues that defendant is liable for failure to train. The pretrial order does not set forth a Section 1983 theory of failure to train, however, and the Court therefore finds that plaintiff has waived such a claim.

b. Fourteenth Amendment Substantive Due Process

The Court next addresses plaintiff's claim that the County's failure to conduct a post-arrest investigation violated his Fourteenth Amendment right to substantive due process. *Baker* rejected a similar claim, holding that the separation of roles precluded any liability against the police officers because the "ultimate determination of claims of innocence" is "in the hands of the judge and the jury." 443 U.S. at 146. This distinction is critical, as *Baker* acknowledged that a "reasonable division of functions between law enforcement officers, committing magistrates, and judicial officers" is "entirely consistent with due process of law." *Id.* at 145. Respect for the separation of functions explains why *Baker* declined to impose on police officers an affirmative duty to investigate claims of innocence and why post-arrest due process guarantees are generally sufficient to protect plaintiff's rights. *Brady*, 187 F.3d at 11 (citing *Baker*, 443 U.S. at 145-46).

In *Baker*, however, the Supreme Court anticipated the "unusual situation" where plaintiff might have a substantive due process claim based on a post-arrest detention. In doing so, it considered (1) the extent of plaintiff's protests, (2) the time elapsed and (3) whether plaintiff received due process procedures. *See* 443 U.S. at 144-45. Here, plaintiff protested on only two occasions (during booking and in his written inmate request), far fewer times than in *Baker*. Plaintiff spent 15 days in the county jail – considerably longer than the three days in *Baker*, but shorter than

in many cases which have found no substantive due process violation. *See Romero,* 45 F.3d at 1474 (three months); *Echols,* 399 F. Supp. 2d 1201, 1202 (D. Kan. 2005) (25 days); *Scull,* 236 F.3d at 592 (30 days). Before he arrived at the jail, plaintiff appeared at a hearing and waived extradition without mentioning mistaken identity to either the court or the public defender. Further, within 24 hours of his transfer to Sedgwick County, plaintiff made his first appearance in state district court, where he again failed to mention mistaken identity. Finally, when plaintiff's lawyers explained the mistaken identity to the prosecutor, the Sheriff's Department immediately released him. Given the extent of plaintiff's protests, the length of time and the due process procedures which plaintiff received, the Court finds as a matter of law that plaintiff has not demonstrated a genuine issue of material fact whether defendant violated his substantive due process rights.

II. State Law Claims

Plaintiff has also asserted state law claims for false arrest/false imprisonment and negligence. The Court's subject matter jurisdiction over these claims is predicated on supplemental jurisdiction under 28 U.S.C. § 1367(a). Plaintiff does not assert diversity of citizenship. Because the Court has granted summary judgment on plaintiff's federal claim, the Court will determine whether to exercise its supplemental jurisdiction over the remaining state law claims.

The district court may decline to exercise supplemental jurisdiction over a state law claim if it has dismissed all claims over which it has original jurisdiction. 28 U.S.C. § 1367(c)(3). It is within the sound discretion of the district court to exercise supplemental jurisdiction. *Medina v. City of Osawatomie,* 992 F. Supp. 1269, 1279 (D. Kan. 1998). In the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine – judicial economy, convenience, fairness, and comity -- will point toward declining to exercise jurisdiction over the remaining state-law claims. *McWilliams v. Jefferson County,* 463 F.3d 1113, 1118 (10th Cir. 2006) (quoting *Carnegie-Mellon University v. Cohill,* 484 U.S. 343, 350 n.7 (1988)).

The Court finds no compelling reasons to exercise supplemental jurisdiction to decide the merits of plaintiff's state law claims. *See Thatcher Enters. v. Cache County Corp.,* 902 F.2d 1472, 1478 (10th Cir. 1990) (notions of comity and federalism demand that state court try its own lawsuits, absent compelling reasons to contrary). In the interest of comity and federalism, the Court dismisses plaintiff's state law claims for false imprisonment and negligence.

IT IS THEREFORE ORDERED that *Defendants' Motion For Summary Judgment* (Doc. #33) filed March 13, 2008 be and hereby is **SUSTAINED as to plaintiff's claims under Section 1983**.

IT IS FURTHER ORDERED that the Court declines to exercise supplemental jurisdiction over plaintiff's state law claims. Plaintiff's state law claims for false imprisonment and negligence are hereby DISMISSED without prejudice.

Dated this 3rd day of July, 2008 at Kansas City, Kansas.

/s/ Kathryn H. Vratil
Kathryn H. Vratil
United States District Judge